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Supreme Court of the United States

OCTOBER TERM, 1952

No. 219

MAPLE ISLAND FARM, INC.
Petitioner,

vs.

WALTER BITTERLING,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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This reply brief will be devoted solely to the correction of certain misleading assertions of fact in Respondent's brief —such as can be discussed with brevity.

1. First there is sought to be conveyed the impression that there may have been evidence outside of the record before the Court of Appeals, and now before this Court, bearing on the question of Respondent's state citizenship. (P. 7) *

By its order of October 8, 1951, the Court of Appeals

* "P" in parenthesis refers to pages of Respondent's brief.
"R" in parenthesis refers to pages of the record.

granted Appellant (Petitioner here) leave "to prepare and print all of the record pertaining to the issue of jurisdiction". (R. 24)

Pursuant to this order Petitioner did file in the Court of Appeals in narrative form all of the Record regarded as being material on the issue of jurisdiction. (R. 29-64)

By its order of January 14, 1952, the Court of Appeals granted Appellee (Respondent here) leave "to print and file such supplemental record bearing upon this issue as he may be advised". (R. 65)

Pursuant to this order Respondent filed a supplemental record in narrative form of additional evidence claimed to be material on this issue. (R. 68-88)

It must be assumed that this record and supplemental record contain all that the parties deemed essential to the consideration and decision of the question of jurisdiction. The fact is that while the record in the trial court is large, the portion of it having any bearing upon the issue of jurisdiction is very brief. That portion was included in the record before the Court of Appeals. It was upon that record the Court of Appeals made its decision. That record is now before this Court.

2. Respondent complains that Petitioner (as Defendant below) did not "actively contest" the question of jurisdiction in the trial court. (P. 2) Respondent's state citizenship was put in issue by the pleadings. (R. 29, 34) The burden was upon Respondent (Plaintiff). Until he introduced some evidence reasonably tending to establish his allegation of citizenship of Oklahoma there was no occasion for Petitioner to "contest" with Respondent on that issue. Until the trial closed Petitioner could not know what the final evidence on

the issue would be. There was no evidence sufficient to make out a *prima facie* case of Oklahoma citizenship.

The parties submitted to the trial court proposed findings. Respondent's first request was for a finding that "Plaintiff is a citizen of the State of Oklahoma and of the United States". Petitioner countered with a request for a finding that "Plaintiff is a citizen of the United States and is and during the times with which this action is concerned has been a resident of Caracas, Venezuela, South America".

After the Court had found on jurisdiction in accordance with Respondent's request, Petitioner moved to amend by striking this finding and substituting a finding that Plaintiff was not a citizen of any state (R. 62, 63) and moved for a conclusion of law that the Court was without jurisdiction and for a dismissal. (R. 63)

3. Respondent's brief says:

> "Since the evidence on plaintiff's intention was necessarily circumstantial, the trial Court was obliged to draw many inferences from the evidence to determine plaintiff's intention." (P. 6)

The evidence of Plaintiff's intention was not "necessarily circumstantial." It was perfectly competent for the Plaintiff to testify directly as to his intention. He could have testified, had such been the fact, that notwithstanding his long residence in Caracas, Venezuela, he always intended to return to Oklahoma. He gave no such testimony. Not only did he fail to testify that he ever entertained the slightest intention of returning to Oklahoma or of ever again residing in that state, but also failed to testify to any intention whatever respecting residence or domicile anywhere. (R. 29-61; 67-88)

4. Respondent's brief asserts that the facts on his citizenship are disputed and that there is considerable controversy as to the weight of the evidence and that there is a dispute on matters of credibility. (P. 8)

No such dispute, controversy or question as to credibility is disclosed by the record. (R. 29-64; 67-88) Respondent concedes that "The evidence is largely plaintiff's own activities and testimony", but claims that "the evidence upon which petitioner places principal reliance is made up of certain documents and testimony which contain ambiguous language".

While there is dispute as to Respondent's credibility and weight of the evidence on other issues, on the issue of jurisdiction Petitioner, in the Court of Appeals and here, relies *wholly* on the testimony of Respondent and upon documents signed by him except one official document issued to him at his instance (Defendant's Exhibit "V," R. 60) and a portion of an affidavit introduced by Respondent. (Plaintiff's Exhibit 145, R. 60, 61) For its bearing on the issue of jurisdiction, the verity of none of this evidence is questioned by either party.

5. The following appears in Respondent's brief:

> "The Yellow Cab Company case, involving as it did a matter of intent, is clearly in point on the present case where, the fact of a business residence in Caracas for less than one year preceding this action being admitted, the determination of plaintiff's Oklahoma citizenship rested primarily upon determination of plaintiff's intention." (P. 6)

The inference from this would seem to be that Petitioner had admitted that Respondent had a business residence in

Caracas for less than one year preceding this action. There was no such admission by Petitioner. It was Respondent who in his brief in the Court of Appeals admitted residence in Caracas "for about eleven months preceding this action". The residence was not characterized as a "business" residence. The evidence in the record proves a residence of Respondent in Caracas for many years prior to the commencement of the action. He admitted the establishment of his *home* in Caracas as early as 1944, six years before commencement of the action (R. 44) and there is no evidence that this home was ever abandoned.

6. Respondent's brief says:

> "Plaintiff answered one of Defendant's pre-trial interrogatories under oath and stated therein that his *permanent* residence was in Oklahoma." (P. 16)

Respondent (Plaintiff) did not so answer. The question was:

> "Of what *state* or country is plaintiff now a citizen? What is his place of residence?"

The answer was:

> "Plaintiff is a citizen of the United States of America. Plaintiff's place of residence is Caracas, Venezuela. Plaintiff's *last state* of *permanent* residence *in the United States*, Oklahoma. * (R. 51)

Here Respondent was called upon to name both the country and the *state* of which he was a citizen. He named the country, but named no state of which he claimed to be a citizen. When confronted with this answer on the trial he did not amplify it. (R. 51)

*Italics supplied.

7. Again, referring to Respondent his brief says:

> "He came to Oklahoma as a small child, having been born in Montana." (P. 16)

There is no evidence that Respondent came to Oklahoma as a small child. The nearest thing to such evidence is his testimony that he attended grade school in Montana. (R. 42) What grade does not appear. It does appear that at some time between the time when he was a young child and his arrival at age thirty he resided in Montana, North Dakota, South Dakota, Illinois, Alabama, and Oklahoma. (Id.) It does not appear whether he resided in these five states between the time of his birth and his going to Montana, or between the latter date and the time of his leaving Oklahoma for Venezuela in 1934 or 1935. (Id.)

8. Again:

> "After he finished his schooling he worked for many years as a secretary and stenographer for a business firm in Tulsa, Oklahoma." (P. 16)

The only justification for such a statement was testimony that in 1934 he was a stenographer and secretary for a firm in Tulsa, Oklahoma. (R. 42)

9. Again:

> "From 1945 to October of 1948 he was engaged in work for defendant and given assignments requiring travel and work in Mexico, Venezuela, the Caribbean, Porto Rico, Cuba, New York, and other parts of the United States." (P. 17)

Respondent had only one "assignment" from Petitioner. That was employment in Caracas in 1948. (R. 47) He had previously, beginning in 1946, served as president of a Vene-

zuelan corporation which acted as distributor of Petitioner's products in Venezuela, on a purchase and resale basis. (R.46)*

Incidentally it should be understood that pages 16 to 20 of Respondent's "Supplemental Record on Issue of Jurisdiction" (R. 84-88) is not original narration of evidence but is a compilation of alleged facts presumably derived or claimed to be, from the actual narrations of the evidence as found on pages 42 to 61 and 68 to 82 of the Record. It is to this compilation that Respondent refers as authority for a number of statements made on pages 16 and 17 of his brief.

Respectfully submitted,

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*Having no bearing on the present issue were two earlier trips of Respondent to Mexico in company with an officer of Petitioner. (R. 75)